No. 12,234

IN THE

United States Court of Appeals

For the Ninth Circuit

TIGHE E. WOODS, Housing Expediter, Office of the Housing Expediter,
Appellant,

vs.

MRS. DOROTHY WARD GINOCCHIO,
Appellee.

APPELLEE'S BRIEF

Appeal From the United States District Court for the District of Nevada.

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

STATUTES AND REGULATIONS

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STATEMENT OF FACTS

The statement of the facts as presented in Appellant's Brief is not controverted, but will be augmented in certain particulars in connection with the argument hereinafter presented.

ARGUMENT

I.

The Court Below Did Not Err in Concluding as Matter of Law That the Leased Housing Accommodation Did Not Constitute a Controlled Housing Accommodation Under the Act.

The housing accommodation leased by instrument dated July 30, 1947 (Exhibit K) (R. 110); and shown on the blueprints Exhibits I and J, differed from the housing accommodations, as shown on the blueprint Exhibit H, as the same existed prior to December 15, 1946 (R. 97), in the following particulars:

(a) The entrance to the structure was changed as to location (R. 84).

(b) The reception hall and closet were previously non-existent (R. 84).

(c) The southeasterly bedroom was formerly a dinette and the closets in the bedroom were previously non-existent (R. 84).

(d) The bedroom lying easterly of the dining room (Exhibit I), was previously a kitchen and nook (R. 84).

(e) The bathroom opening off the bedroom just mentioned was previously a porch or patio (R. 84, 85).

(f) The dining room was formerly a bedroom (R. 85).

(g) The closet space off the dining room was formerly a stairway to the basement (R. 85).

(h) North from the dining room is a hallway that did not exist previously (R. 85).

(i) The northwesterly bedroom was formerly a living room (R. 85).

(j) The kitchen was formerly a breakfast nook and kitchen (R. 85). The kitchen fixtures are new and in new locations (R. 100).

(k) The breakfast room occupies space that was in part a screen porch and in part newly added area (R. 86).

(l) The basement bedroom did not previously exist (R. 86).

(m) The house is equipped with a single central heating plant (R. 86). Previously there were two floor furnaces (R. 91).

(n) Of the five bedrooms on the main floor only the northerly two were previously in existence (R. 86).

(o) The bath opening off the hallway between the dining room and the kitchen is of different shape and arrangement and contains entirely new fixtures (R. 99, 100).

(p) Those portions of the exterior walls and the interior partitions that are shaded as shown on Exhibit I are new construction and did not previously exist (R. 92).

The Area Rent Director, on his own motion, on December 12, 1947, fixed the rental for the leased housing accommodation at the sum of $180.00 per month (Exhibit 2). The rental for that portion of the housing accommodation previously rented had, by the Area Rent Director, previously on November 8, 1946, been fixed at $57.50 per month (Exhibit 5), which, in itself, conclusively indicates that the Area Rent Director considered that the housing accommodation covered by the lease agreement was in fact

not the same housing accommodation that defendant had previously rented.

Section 1(b)(8)(i) of Controlled Housing Rent Regulation (12 F.R. 4331) (Appellant's Brief p. 54) provides:

> "For the purposes of this Paragraph (8) the construction of housing accommodation is considered completed on the date the last material, fixture or equipment is incorporated into the structure, provided the dwelling is suitable for occupancy at that time."

The defendant contends that the construction of the housing accommodation described in the lease agreement (Exhibit K), that is the building or structure leased, was completed after February 1, 1947.

The Court below so concluded (R. 22). The conclusion is supported by the evidence presented to the Court below, portions of which are hereinabove referred to and concerning which there is practically no dispute.

This case is to be distinguished from that of *Elma Realty Co. v. Woods,* 169 F.2d 172, where the building involved was rendered untenantable by reason of fire and the Court found that the landlord had simply restored the old apartments.

Rather the present case is to be compared to that of *Delsnider v. Gould,* 154 F.2d 844, where at pages 847 and 848 the Court said:

> "The question whether the housing accommodations involved are new ones not rented on the critical date, or are old ones with substantial capital improvements or alterations, is a question of fact, which, in an action such as that at bar, must, unless the evidence is compelling one way or the other, be decided by the jury. The answer may be elusive and

the line difficult to determine in some cases; but there is a line. If, on January 1, 1941, there were on a given lot a one-story frame shack, and thereafter the owner tore down the shack and built a new, two-story, brick dwelling with completely modern equipment, there could be no doubt that the latter housing accommodations were new. If, on the other hand, a dwelling were rented on the critical date and thereafter the landlord moved a partition, or, as in *Gilbert v. Thierry,* merely installed a mechanical refrigerator, the resulting accommodation is not new but is the old with improvements or alterations. Between these two extremes is a difference which grows less clear as the borderline is approached. By analogy, it is not unlike the line between repairs and capital improvements with which business men and accountants are almost daily concerned and with which the courts must frequently deal.

In the present case, we think only one conclusion possible. The evidence is vivid and compelling. The completely equipped and furnished house rented to these appellees was a new housing accommodation not theretofore rented. A contrary conclusion, that this combination of house, facilities, equipment and furnishings, fairly worth $85.00 a month by the Administrator's finding, was the same as the 'shack in a terrible condition' rented at these premises on January 1, 1941, for $15.50 a month, could not have been sustained."

There is no dispute in the case at bar relating to the facts. From the facts the Court below concluded that no violation of any statute had occurred. Whether there was or was not such a violation becomes a legal question and not a question of fact. *American School of Magnetic Healing v. McAnnulty,* 187 U.S. 94.

II.

The Court Below Did Not Err in Permitting the Defendant to Establish as Matter of Defense That the Housing Accommodation Was Not a Controlled Housing Accommodation.

The complaint filed by the Housing Expediter (R. 2) was filed under Section 206(b) of the 1947 Act (Appellant's Brief p. 53).

Before the complaint can be sustained it must appear that the housing accommodation constituting the subject matter of the complaint was a "controlled housing accommodation" within the meaning of the 1947 Act, for by Section 206(a) of the Act (Infra App. A) it is only the receiving of rent in excess of the maximum prescribed by Section 204 for the use and occupancy of a *controlled housing accommodation* that is made unlawful.

Section 204(d) of the 1947 Act (Infra page 7) authorizes the Housing Expediter to issue such regulations as may be necessary to carry out the provisions of Section 204 and Section 202(c).

Section 210 of the 1947 Act (Infra App. A) makes the Administrative Procedure Act inapplicable to the Housing and Rent Act of 1947.

The Act of 1947, prior to amendment in 1948, made no provision for review of orders by the Housing Expediter or for review of orders made pursuant to regulation or rule of the Housing Expediter. Likewise nothing contained in the Act of 1947 purports to give any degree of finality to any order of the Housing Expediter or to any order made pursuant to regulation or rule of the Housing Expediter.

A. THE 1947 RENT ACT DOES NOT PROVIDE THAT THE DECISION OF ANY BOARD, OFFICER OR COURT SHALL BE FINAL.

In

LaVerne Co-Op Citrus Assn. v. United States, 143 F.2d 415-416;

And in

Myers v. Bethlehem Shipbuilding Corporation, 303 U.S. 41, 50;

And in

Yakus v. United States, 321 U.S. 414, 429;

And in

Macauley v. Waterman Steamship Corp., 327 U.S. 540, 544;

And in

United States v. Ruzicka, 329 U.S. 287, 291.

The Congress had by express legislative act made the administrative procedure prescribed in the act final. Each of the cases is authority for the rule that the Congress has the power to vest exclusive jurisdiction in the particular Board or Court designated.

The cases arising under the provisions of the Emergency Price Control Act of 1942 are not authority that may be relied on determining cases arising under the Rent Control Act of 1947, for by the express provisions of Section 204(d) of the 1942 Act it was provided:

> "The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued * * *."

The Court in the case of *Koster v. Turchi,* 173 F.2d 605, held that a tenant must apply in accordance with the prescribed procedure for a reduction in rent before seeking equitable relief in the courts from an order increasing applicable maximum rentals. This holding is in strict accord with the first proviso in Section 204(b) of the 1947 Act.

> "* * * Provided, however, that the Housing Expediter shall, by regulation or order, make such adjustments in such maximum rents as may be necessary to correct inequities or further carry out the purposes of this title."

The authority to fix maximum rents is clearly vested in the Housing Expediter by the Act.

B. THE HOUSING EXPEDITER MAY NOT HAVE EXCLUSIVE POWER TO DETERMINE HIS OWN JURISDICTION.

An administrative body may not have exclusive power to determine its own jurisdiction, an act may confer upon such a body exclusive initial power to make an investigation and then provide for a judicial review that is exclusive.

> *Newport News S. & Dry Dock Co. v. Schauffler,* 303 U.S. 54, 57.

To the same effect is the case of *Crowell v. Benson,* 285 U.S. 22, where the court permitted the complainant to present facts showing that the case lay outside the purview of the statute and in so doing said (p. 65):

> "It cannot be regarded as an impairment of the intended efficiency of an administrative agency that it is confined to its proper sphere * * *."

In *Social Security Board v. Nierotko,* 327 U.S. 358, the Court said (p. 369):

> "An agency may not finally decide the limits of its statutory power. That is a judicial function."

C. THE HOUSING EXPEDITER MAY NOT BY REGULATION ENLARGE THE SPHERE OF THE ACT.

The Housing Expediter is not authorized by the Act to prescribe any rule or regulation concerning any housing accommodations that are not subject to the Act of 1947. However, by rule or regulation the Housing Expediter did endeavor to enlarge the scope of the statutory definition of controlled housing accommodations as prescribed by Congress in Section 202(c) of the 1947 Act, by providing in Section 1(b)(8) of "Controlled Housing Rent Regulations under the Housing and Rent Act of 1947" (12 F.R. 4331) (Appellant's Brief p. 54) that the regulations, and therefore the 1947 Act, shall apply to housing accommodations the construction of which was completed after February 1, 1947, unless, and until, the landlord shall file a "Report of Decontrol" on a form provided by the Expediter and within a specified period of time.

Where the definition promulgated by an administrative body is beyond the scope of the Act the entire regulation or definition must fall.

Addison v. Holly Hill Fruit Products, 322 U.S. 607.

A regulation promulgated by an administrative body to be valid must be consistent with law.

International Railway Co. v. Davidson, 257 U.S. 506, 514.

Such a regulation may not extend a statute or modify its provisions.

Campbell v. Galeno Chemical Co., 281 U.S. 599, 610.

If, as in the case at bar, the regulation be not consistent with law and if, as in the case at bar, Congress has provided no exclusive review procedure but has specifically recognized the applicability of judicial review by statutory provision, it must be deduced that Congress did intend that the courts designated could consider whether or not a regulation or an order of the administrative body is consistent with the applicable law.

D. COURT REVIEW IS CONTEMPLATED BY ACT.

Section 206(b) of the 1947 Act provides:

> "Whenever in the judgment of the Housing Expediter any person has engaged or is about to engage in any act or practice which constitutes or will constitute a violation of subsection (a) of this section, he may make application to any Federal, State or Territorial court of competent jurisdiction, for an order enjoining such act or practice, or for an order enforcing compliance with such subsection, and upon a showing by the Housing Expediter that such person has engaged or is about to engage in any such act or practice a permanent or temporary injunction, restraining order, or other order shall be granted without bond."

Section 206(b) of the 1947 Act provides that the Housing Expediter must show in the contemplated action that the defendant has engaged or is about to engage in a prohibited act or practice. This proviso must likewise authorize the defendant to show that he did not engage

in a prohibited act or practice. The Housing Expediter must therefore show to the court that the defendant's housing accommodation and the language of the statute will not preclude the defendant from showing that her housing accommodation was not a controlled accommodation within the definition of the statute and the regulation cannot increase the scope of the statute.

The case at bar is similar to that of *Stark v. Wickard,* 321 U.S. 288, where the court said (pp. 309, 310):

> "When, as we have previously concluded in this opinion, definite personal rights are created by federal statute, similar in kind to those customarily treated in courts of law, the silence of Congress as to judicial review is, at any rate in the absence of an administrative remedy, not to be construed as a denial of authority to the aggrieved person to seek appropriate relief in the federal courts in the exercise of their general jurisdiction. When Congress passes an Act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted * * *. The responsibility of determining the limits of statutory grants of authority in such instances is a judicial function entrusted to the courts by Congress by the statutes establishing courts and marking their jurisdiction."

To the same effect is *Estep v. United States,* 327 U.S. 114, 121;

United States v. George, 228 U.S. 14;

Teal v. Felton, 12 Howard 284; and

Miller v. United States, 294 U.S. 435. Rehearing denied, 294 U.S. 734.

The case of *Gates v. Woods,* 169 F.2d 440, was decided by the Circuit Court of Appeals, Fourth Circuit, under the 1947 Act and the regulations promulgated by the Housing Expediter. The Court relied for authority on *Black River Valley Broadcasters, Inc. v. McNinch,* 101 F.2d 235, in which case a statute was involved that provided a specific administrative procedure with an appeal to a designated court. It is repeated that in the case at bar and in the *Gates* case the Act does not prescribe any administrative remedy or any judicial appeal to any specific court to the exclusion of all others, but does contemplate enforcement actions and requires a showing by the Housing Expediter. It is submitted that the *Gates* case should not be followed in the case at bar.

Where it appears that there is a violation of a person's legal rights under an applicable statute, there is no longer any occasion for the requirement that he exhaust his administrative remedies before seeking to vindicate his rights in Court.

Wettre v. Hague, 168 F.2d 825;
Clinkenbeard v. United States, 88 U.S. 65;
American School of Magnetic Healing v. McAnnulty, 187 U.S. 94.

In *Woods v. Western Holding Corporation,* 173 F.2d 655, the action was, like the one at bar, brought to enjoin the defendant from collecting and charging over-ceiling rents. The action was also to prevent the eviction of tenants. By answer, the defendant alleged that the property in question was not subject to control because of the adoption of Section 202(c) of the 1947 Act. The court held

the premises to be excluded from control under the section. It does not appear from the decision whether any proceeding for decontrol had been taken by the defendant prior to the suit.

III.

The Defendant Did Pursue and Exhaust Her Administrative Remedy.

Rent Procedural Regulation 1 (12 F.R. 5619) provides for an order upon determination of proceedings on report or application for decontrol in Section 840.22, which section provides as follows:

> "If in a proceeding instituted under Section 840.21 it is determined that the report or application should be rejected, the rent director shall issue an appropriate order determining that the accommodations remain subject to control and establishing the maximum rent."

Section 840.23(a) deals with Landlord's Application for Review of Rent Director's action and provides in part as follows:

> "Any landlord, except a landlord subject to an order issued pursuant to Sec. 840.8(c), whose petition for adjustment or other relief has been dismissed or denies in whole or in part by the rent director, or any landlord subject to an order entered by the rent director on his own initiative, may file with the rent director an application for review of such determination by the Regional Rent Administrator for the region in which the defense-rental area office is located: Provided, that any landlord subject to an order entered under section 5(d) of any maximum rent regulation or subject to an order entered by the rent director under sections 840.7, 840.16 or 840.22 may either apply for review of such order as pro-

vided in this section, or may appeal any provision of such order as provided in section 840.25 and following of this part. An application for review shall be filed in triplicate upon forms prescribed by the Housing Expediter and pursuant to instructions stated on such forms. Upon the filing of an application for review of such determination, the rent director shall forward the record of the proceedings, with respect to which such application is filed, to the appropriate Regional Rent Administrator."

This section provides that the landlord may apply for review to the Regional Rent Administrator or to the Housing Expediter. It does not provide that both remedies may be pursued.

Mr. Richards addressed a communication to Ward Cox, the Regional Administrator, on December 20, 1947 (R. 44-45). The letter was not in the prescribed form for an appeal and was mailed after the expiration of the time for appeal specified in the Regulation. Nevertheless, the Regional Administrator did accept the letter and did state that he had insufficient facts "to be able to determine whether or not the action of the area rent office was correct" and stated further that he was writing the area office for a report (R. 39-40).

On January 2, 1948, the Regional Rent Administrator did determine that the action of the Area Rent Office was correct (R. 44). The appeal may have been late and not in proper form, but it was accepted and a determination was made.

While the provisions of the Rent Procedural Regulation 1 (12 F.R. 5619), may have permitted a further appeal the final statement in the letter of Ward Cox, dated February

10, 1948 (R. 44), reading: "As suit has now been filed, decision in this case rests with the Court," would certainly halt any further pursuit of any administrative remedy by the defendant.

IV.

Conclusion

Whether it be determined that the defendant did pursue her administrative remedy by an appeal to the Regional Rent Director, which appeal was accepted and determined, or whether it be determined that the Housing Expediter may not enlarge the sphere of the Act by regulation and may not be the sole judge of his jurisdiction, and that the Act contemplates that jurisdictional facts must be established in a suit under section 206(b), it is submitted that the decree of the court below should be sustained.

Respectfully submitted,

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(Appendix follows)

APPENDIX A

Pertinent provisions of the Housing and Rent Act of 1947 (50 U.S.C. App., Secs. 1881 et seq.):

Section 204(d):

The Housing Expediter is authorized to issue such regulations and orders, consistent with the provisions of this title, as he may deem necessary to carry out the provisions of this section and section 202(c).

Section 206(a):

It shall be unlawful for any person to offer, solicit, demand, accept, or receive any rent for the use or occupancy of any controlled housing accommodations in excess of the maximum rent prescribed under section 204.

Section 210:

Section 2(a) of the Administrative Procedure Act, as amended, is amended by inserting after "Selective Training and Service Act of 1940;" the following: "Housing and Rent Act of 1947;"